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No. 81-2098

IN THE

Supreme Court of the United States

October Term, 1981

SUNTEX DAIRY, ET AL., *Petitioners*,

vs.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE OF THE UNITED STATES, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF ASSOCIATED MILK PRODUCERS, INC., AMICUS CURIAE IN OPPOSITION TO PETITION

SYDNEY BERDE
(Counsel of Record)
RICHARD M. HAGSTROM
GARY W. SCHOKMILLER
BERDE AND HAGSTROM, P.A.
2602 American National
Bank Building
Saint Paul, Minnesota 55101
(612) 291-8106
Attorneys for Associated Milk Producers, Inc., Amicus Curiae in Opposition

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit erred in holding that the Secretary of Agriculture's decision to include the Corpus Christi Federal Milk Marketing Area in a merger of six Texas milk orders into a single federal milk order was supported by substantial evidence?

2. Whether the Fifth Circuit erred in concluding that the determination of the Secretary of Agriculture, made pursuant to 7 U.S.C. §§608c(9) (A)-(B), (a) that the refusal or failure of handlers to sign the Texas Milk Marketing Agreement tends to prevent effectuation of the declared policy of the Agricultural Marketing Agreement Act (7 U.S.C. §601 *et seq.*) and (b) that the issuance of the Texas Order, which amends and merges the six orders, is the only means pursuant to the declared policy of the Act of advancing the interests of the producers as defined in the order, was agency action "committed to agency discretion by law," unreviewable except for procedural irregularity or fraud?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF ASSOCIATED MILK PRODUCERS, INC., AMICUS CURIAE IN OPPOSITION TO PETITION

Associated Milk Producers, Inc., *amicus curiae* herein, respectfully requests this Court to deny the petition for a writ of certiorari presented by Suntex Dairy, *et al.*, to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

INTEREST OF ASSOCIATED MILK PRODUCERS, INC., AMICUS CURIAE

Associated Milk Producers, Inc. (AMPI) is an agricultural cooperative of dairy farmers organized under the laws of the State of Kansas with its principal place of business in San Antonio, Texas. AMPI, as a qualified Capper-Volstead cooperative, 7 U.S.C. §291 *et seq.*, is the exclusive marketing representative of its member-producers, some of whom comprise approximately seventy percent (70%) of the producers pooled in the Texas Milk Marketing Area, Order No. 126, 7 C.F.R. §1126 *et seq.*

AMPI was the principal proponent of the Secretary of Agriculture's final order (40 F.R. 23437)[1] which provided for the merger of six previously independent federal milk marketing orders into a single order known as the Texas Milk Marketing Order No. 126, 7 C.F.R. §1126 *et seq.*, and which is the subject of the *Petition* herein. The six orders were merged in response to changes in the structure of the market and to assure the orderly marketing of milk in Texas. AMPI was permitted to file briefs and to participate in oral arguments as *amicus curiae* in support of the Secretary of Agriculture, respondent herein, in both the District Court and the Court of Appeals. November 20, 1979 *Order* of Hon. Robert O'Connor, Jr., United States District Court Judge for the Southern District of Texas; *Letter* of April 3, 1981 from Mr. Gilbert F. Ganucheau, Clerk of Court for the United States Court of Appeals for the Fifth Circuit; October 21,

[1] Reprinted in Appendix F (App. F) of petitioners' *Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit* dated May 11, 1982 (hereinafter *Petition*).

1981 *Order* of Hon. Albert Tate, Circuit Judge for the United States Court of Appeals for the Fifth Circuit.

As the representative of approximately 70 percent of the dairy farmers "pooled" under the Texas Milk Marketing Order No. 126, AMPI has a direct interest in the outcome of this *Petition*. AMPI's brief *amicus curiae* in opposition to the granting of the writ of certiorari sought by petitioners supports the decision of the Secretary of Agriculture, which was sustained on review by the District Court and affirmed by the Court of Appeals.

STATEMENT OF THE CASE

Petitioners brought this suit in the United States District Court, Southern District of Texas, against the United States Secretary of Agriculture (the Secretary). Petitioners are milk producers who objected to the Secretary's decision to merge the Corpus Christi regulated milk marketing area into a single regulated "Texas Milk Marketing Area," encompassing an area that, prior to the decision, was regulated under six separate "Federal Milk Orders."[2] Prior to the issuance of the merged "Texas Milk Marketing Area" Order (hereinafter "Order") in 1975, petitioners were regulated under the Corpus Christi Milk Marketing Order (formerly 7 C.F.R. §1130 *et seq.*).

Section 8c of the Agricultural Milk Marketing Act of 1937 (the Act), 7 U.S.C. § 608c, authorizes the Secretary to adopt "orders" regulating the handling of milk in specified marketing areas. Pursuant to such authority and in accordance with

[2] The six federal milk orders were: South Texas, North Texas, San Antonio, Central West Texas, Austin-Waco and Corpus Christi. (Formerly, 7 C.F.R. §§1121, 1126, 1127, 1128, 1129 and 1130, respectively.)

the regulations governing the adoption of proposed milk marketing orders, 7 C.F.R. §900 *et seq.*, the Secretary held a properly noticed[3] public hearing on the proposed merger of the six federal milk marketing orders in question.[4]

Nine days of public hearings[5] produced over 1600 pages of record evidence for the Secretary to consider in reaching his recommended decision entered on November 22, 1974. *See* 39 F.R. 18448. Following consideration of exceptions to his recommended decision, the Secretary issued a final decision setting forth "findings" and reasons supporting his decision directing the merger of the six milk marketing orders involved in this case. 40 F.R. 20004, *et seq.*, May 2, 1975, *Petition*, App. E. In accordance with §8c(4) of the Act, 7 U.S.C. §608c(4), the Secretary specifically found that the merged Order tended to "effectuate the declared policy of" the Act. 40 F.R. 20038, *Petition* at A221, App. E.

Thereafter, in accordance with §8c(9)(B) of the Act, 7 U.S.C. §608(c)(9)(B),[6] the Secretary conducted a referendum and determined that two-thirds of the affected producers approved of the final decision.[7] 40 F.R. 23438, *Petition* at

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[3] Notice of the hearing was published in the Federal Register on November 9, 1973. 38 F.R. 31432.

[4] AMPI submitted to the United States Department of Agriculture, Dairy Division, the proposal for merging the six federal milk marketing orders in question.

[5] The public hearings were held in Dallas, Texas, on December 3-7, 1973 and January 22-25, 1974.

[6] Section 8c(9)(B) of the Act, 7 U.S.C. §608c(9)(B), requires that before a final order may be issued by the Secretary, he must determine that at least two-thirds of the producers in the affected area approve of the issuance of the order.

[7] As a qualified Capper-Volstead cooperative, AMPI voted on behalf of its members, as authorized by the Act (7 U.S.C. §608c(12)), to approve the Secretary's decision to merge the six federal milk orders into one.

A226, App. F. The Secretary also made the "determinations" required by §§8c(9)(A) and (B) of the Act, 7 U.S.C. §§608c (9)(A)-(B), that the "refusal or failure of handlers . . . to sign a proposed marketing agreement, tends to prevent the effectuation of the declared policy of the Act," 40 F.R. 23438, *Petition* at A226, App. F, and that "[t]he issuance of the Texas Order . . . is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the Texas order." *Id.*

Petitioners sought judicial review pursuant to §8c(15)(B) of the Act, 7 U.S.C. §608c(15)(B), and charged in their original Complaint that (1) there was a lack of substantial evidence to support the Secretary's merger decision, and (2) the referendum was invalid because of AMPI's bloc vote which, according to petitioners, violated the Final Consent Judgment in *United States v. Associated Milk Producers, Inc.*, 394 F. Supp. 29 (W.D. Mo. 1975). The District Court's order, *Petition*, App. D, granting defendant Secretary's motion to dismiss for lack of standing was reversed by the United States Court of Appeals for the Fifth Circuit. *Suntex Dairy v. Bergland*, 591 F.2d 1063, 1067 (5th Cir. 1979), *Petition* at A40, App. C. The Fifth Circuit held that "[t]he milk producers have standing to seek substantive review of the Secretary's finding that a Texas-wide order should be effectuated . . ." *Id.*[8]

Upon remand the District Court granted summary judgment in favor of the Secretary and dismissed petitioners' Complaint. *Memorandum and Order* of August 4, 1980, *Peti-*

[8] As to AMPI's bloc vote, the Fifth Circuit held that while it may have violated the terms of the Missouri district court's injunction, the Secretary's milk order decision could not be invalidated on that ground. 591 F.2d at 1068, *Petition* at A41, App. C.

tion, App. B. The District Court held, as to the "primary issue before [the] Court," that "the Secretary's conclusion that the Corpus Christi market should be included in the Texas milk marketing area order is supported by substantial evidence in the record." *Id.* at A24. As to the alleged failure of the Secretary to make the requisite determinations that the refusal of handlers to sign the marketing agreement tends to prevent the effectuation of the declared policy of the Act and that the issuance of the order is the only practical means of advancing the interests of the producers, the District Court noted that "[t]he Secretary did enter the necessary finding . . . and for the aforesaid reasons the Court determines that there is substantial evidence in support of said finding." *Id.* at A27.

On petitioners' second appeal, the Fifth Circuit held that the Secretary's determination that the merged Order tended to effectuate the policy of the Act was supported by "abundant evidence" and was neither arbitrary, capricious, nor an abuse of discretion. *Suntex Dairy v. Block*, 666 F.2d 158, 162 (5th Cir. 1982), *Petition* at A10, App. A. The Fifth Circuit further held that the Secretary's "determinations" that the lack of handler approval tended to prevent the effectuation of the declared policy of the Act and that the issuance of the producer approved order was the only practical means of advancing the interests of the producers, were agency actions committed to the Secretary's discretion by law and were not reviewable by the courts except for procedural irregularity or fraud. 666 F.2d at 167, *Petition* at A20, App. A.

SUMMARY OF ARGUMENT

Petitioners do not assert any "special" or "important" reasons justifying the exercise of this Court's discretion to issue a writ of certiorari. The Supreme Court does not grant review by certiorari merely for the purpose of correcting "errors" of the lower courts.

The Secretary's decision to merge the six former Texas milk marketing orders into a single order was supported by substantial evidence on the record and the Fifth Circuit correctly so held. The "determinations" made by the Secretary pursuant to 7 U.S.C. §608c(9) were nonreviewable agency actions committed to the Secretary's discretion by law. The Fifth Circuit, in so holding, took great care to follow and correctly apply the mandates of *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). Moreover, the Secretary's "determinations" under 7 U.S.C. §608c(9), which does not require an evidentiary hearing to be held or "findings" to be made, are clearly neither arbitrary, capricious nor contrary to law, the appropriate standard of review in such a case.

ARGUMENT

I. PETITIONERS' FAILURE TO PUT FORTH ANY "SPECIAL" OR "IMPORTANT" REASONS JUSTIFYING THE EXERCISE OF THIS COURT'S DISCRETION TO ISSUE A WRIT OF CERTIORARI MANDATES THE DENIAL OF THEIR PETITION.

It is patent that review by this Court on writ of certiorari is not a matter of right, but rather is a matter entrusted to this Court's judicial discretion. *Cf.* Rule 17.1 with Rule 10,

Sup. Ct. R. The rules of this Court make clear that only those few petitions which set forth "special and important reasons" for the granting of a writ of certiorari will be granted by the Court. Rule 17.1, Sup. Ct. R. Notwithstanding this admonition, petitioners have totally failed to put forth *any* reasons in their *Petition* why a writ of certiorari should be granted, and instead merely reiterate and rephrase arguments previously presented to and rejected by both the District Court and the Court of Appeals. *See Petition* at 6-19.

Rule 17.1 of the Supreme Court Rules reads in pertinent part:

> A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are *special and important reasons* therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power or supervision.
>
> . . . .
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. (Emphasis added)

While the above criteria are merely illustrative, they are indicative of the types of "reasons" relied on by this Court for the granting of a writ. Petitioners do not assert that the decision herein is in conflict with the decisions of other circuits or is contrary to any decisions of this Court. There is no conflict between the decision of the Fifth Circuit and any state court of last resort regarding a federal question and there has been no departure from the accepted and usual course of judicial proceedings by the Fifth Circuit. Manifestly, there is no important question of constitutional law requiring review by this Court. *See Petition* at 6-19. The closest petitioners come to asserting *any* reason whatsoever for granting their writ, are their conclusory allegations that "the United States Court of Appeals for the Fifth Circuit decided important issues of statutory construction not heretofore specifically determined by this Court" and that it "failed to adhere to the teachings of *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)." *Petition* at 6.

In the body of their *Petition*, petitioners "amplify[] the reasons relied on for the allowance of the writ," Rule 21.1(j), Sup. Ct. R., by asserting precisely the same arguments on the merits made to and rejected by the Fifth Circuit. The identical "domino concept" theory of petitioners, *Petition* at 15-18, was presented to and rejected by the Fifth Circuit. *Petitioners' Fifth Circuit Brief* at 16; *see Suntex Dairy v. Block*, *supra*, at 163, *Petition* at A10, App. A. Similarly, petitioners' argument that the Fifth Circuit misconstrued the Agricultural Marketing Agreement Act of 1937, *Petition* at 7, essentially restates their previously made argument that the Secretary's determinations under §8c(9) of the Act, 7 U.S.C. §608c(9), were arbitrary, capricious, unsupported by substantial evi-

dence and not in accordance with law. *See Petitioners' Fifth Circuit Brief* at 40-43. This argument was also rejected by the Fifth Circuit. 666 F.2d at 167, *Petition* at A19, App. A.

As clearly evidenced by their *Petition*, petitioners' "reasons" for seeking a writ of certiorari amount to nothing more than an assertion by them that the Fifth Circuit committed "error" in its decision. *See, e.g., Petition* at 15, 17, 18. Such an assertion is simply inadequate as a matter of law to invoke the jurisdiction of this Court by means of a writ of certiorari. As stated by Chief Justice Fred M. Vinson, "The Supreme Court is not, and never has been primarily concerned with the correction of errors in lower court decisions." Address of Chief Justice Vinson to the American Bar Association, September 7, 1949 (*Address*), 69 S.Ct. V, VI. Furthermore, "[t]he jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Co. v. Coty*, 262 U.S. 159, 163 (1923); Stern and Grossman, *Supreme Court Practice*, (5th ed. 1978) at 257-258.

Other than some bald assertions to the effect that this case involves important issues or questions, petitioners have wholly failed to demonstrate any "reason" why it might be deemed important for the Court to hear and decide this case. The Supreme Court "do[es] not grant a [writ of] certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). As Chief Justice Vinson noted almost 33 years ago, "to remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." *Address, supra*, 69 S.Ct. at VI. The present *Petition* fails to present any questions of such importance.

II. THE COURT OF APPEALS CORRECTLY HELD THAT THE SECRETARY'S DETERMINATIONS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE AND WERE NEITHER ARBITRARY, CAPRICIOUS NOR CONTRARY TO LAW.

In addition to their failure to provide any *reasons* for granting the requested writ of certiorari,[9] petitioners allege "error" on the part of the Fifth Circuit for its rejection of the same arguments petitioners are now attempting to put before this Court. *Petition* at 6-19. Contrary to petitioners' allegations, the Fifth Circuit correctly held that: (1) the Secretary's decision to merge the six milk orders into a single order was supported by substantial evidence on the record and was neither arbitrary, capricious nor contrary to law; and (2) the determinations made by the Secretary pursuant to §8c(9) of the Act, 7 U.S.C. §608c(9), were agency actions committed to the discretion of the Secretary by law and were thus unreviewable.

A. The Secretary's Decision To Merge The Corpus Christi Milk Order With The Other Five Milk Orders To Form The Texas Milk Marketing Order Was Based Upon Substantial Evidence On The Record.

One of the "reasons" (*Petition* at 15) petitioners present to support the granting of their petition is that the Fifth Circuit

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[9] As evidence of the fact that petitioners' "reasons" are nothing more than arguments on the merits, compare their "Questions Presented" (merits of the case) with their "Reasons for Granting Writ" (non-merits arguments demonstrating why case is important). *Petition* at i, 6, 15. As such a comparison makes clear, the first and second "reasons" are merely restatements of the first and second "questions," respectively.

"erred" in upholding the Secretary's decision to merge the six milk orders into one. Both the "domino concept" theory, *Petition* at 15-18, and the argument that there must be a "substantial interrelationship" between the Corpus Christi Order and each of the former orders prior to merger, *Petition* at i, 16, were presented to and rejected by the Fifth Circuit. *Petitioners' Fifth Circuit Brief* at 16; 666 F.2d at 162, *Petition* at A10, App. A. Both of these arguments here, as below, simply ignore the fact that the Secretary's determinations were supported by substantial evidence on the record and were neither arbitrary nor capricious. Moreover, it is not the function of this Court to determine the adequacy of the Court of Appeals' review of the Secretary's determinations. *Mobil Oil Corp. v. Federal Power Commission*, 417 U.S. 283, 309 (1974).

The "substantial evidence" standard of review of agency action, 5 U.S.C. §706(2)(E), requires only that an agency determination be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938); *United States v. Mills*, 315 F.2d 828, 838 (4th Cir.), *cert. denied sub nom. Willow Farms Dairy, Inc. v. Freeman*, 374 U.S. 832 (1963) (the Secretary need only make a "reasoned" order).

The "arbitrary and capricious" standard of review, 5 U.S.C. §706(2)(A), is a more narrow standard and permits the reviewing court merely to determine whether the agency considered "the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, *supra*, at 416; *Camp v. Pitts*, 411 U.S. 138, 141 (1973). In the present case, the Fifth Circuit found that "[t]here was [substantial] evidence presented at the hear-

ing[10] from which the Secretary" could find that the merger of the six orders into one "tended to effectuate" the policy of the Act. 666 F.2d at 162, *Petition* at A10, App. A; *see* 40 F.R. 20005-007, *Petition* at A59-A73, App. E.

While petitioners make certain bald assertions in their *Petition* in an attempt to convince the Court of the "importance" of their case, *Petition* at 18,[11] it is apparent that their complaint here, as below, is not with the lack of evidence to support the Secretary's findings, but with the analysis and conclusions reached by the Secretary based on that evidence. However, such a disagreement with the Secretary's reasoning simply does not raise a substantial evidence question.[12] *Florida Sugar Cane League, Inc. v. Usery*, 531 F.2d 299, 303 (5th Cir. 1976).

A more fundamental problem with petitioners' "domino concept" theory, is the fact that it simply is not the responsibility of this Court to determine whether agency findings are supported by substantial evidence. *Mobil Oil Corp. v. Federal Power Commission, supra*, at 309. "Whether on the

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[10] It should be noted that the petitioners did not appear at the rule-making hearing though they had notice of the hearing and were afforded the opportunity to present evidence opposing the Corpus Christi merger. *See* 40 F.R. 20005, *Petition* at A59, App. E.

[11] Petitioners' failure to set forth any "reasons" for granting a writ of certiorari cannot be overcome by merely asserting that "[T]his matter also involves an important question of federal law and statutory construction." *Petition* at 18. As that same sentence of the *Petition* makes clear, the petitioners' only basis for requesting a writ of certiorari is the alleged "error of the Secretary and the Courts below." *Id. See* discussion, *supra*, at 10.

[12] As previously noted, the Order promulgated by the Secretary in the present case was based on the record produced at the hearings required by 7 U.S.C. §608c(3). The substantial evidence test is the appropriate standard to apply when reviewing findings of an agency made upon a hearing record. *Camp v. Pitts, supra*, at 141.

record as a whole there is substantial evidence to support an agency's findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 491 (1951); *accord, Mobil Oil Corp. v. Federal Power Commission, supra*, at 310. This clearly is not such a rare instance.

B. The Secretary's Determination That The Failure Or Refusal Of The Handlers To Approve The New Texas Order Tends To Prevent Effectuation Of The Policy Of The Act And That The Issuance Of The Merger Order Is The Only Practical Means Of Advancing The Interest Of Producers Was Neither Arbitrary, Capricious Nor Contrary To Law And Is Unreviewable Agency Action Committed To Agency Discretion By Law.

Petitioners argue that the Fifth Circuit "erred" in holding that the Secretary's determinations pursuant to §8c(9) of the Act, 7 U.S.C. §608c(9), were agency actions, unreviewable except for either "procedural irregularity or fraud." *Petition* at 6. Specifically, petitioners argue first, that the Fifth Circuit "misconstrued" the Act and, second, that it failed to "apply the teachings of *Overton Park* with sufficient fidelity." *Petition* at 7, 14. As will be seen, neither of these arguments on the *merits* warrants review by this Court of the present case.

1. The Fifth Circuit Correctly Held That The Secretary Fully Complied With The Mandates Of The Act.

Section 8c(9) of the Act, 7 U.S.C. §608c(9), provides that an order may become effective notwithstanding the refusal or failure of handlers to sign a marketing agreement if the Secretary *determines* that: "(A) . . . the refusal or failure . . . tends to prevent the effectuation of the declared policy of [the Act] . . . , and (B) [t]hat the issuance of such order is the only practical means of advancing the interests of the producers . . . pursuant to the declared policy. . . ." Petitioners assert that the determinations made by the Secretary, *Petition* at A226, App. F, pursuant to §8c(9) of the Act, 7 U.S.C. §608c(9), were not made in accordance with the "statutory scheme" and are thus, erroneous. *Petition* at 6-12.

It is patent that the Secretary is required only to "determine" that the effectuation of the Act's policy and the "interests of the producers" require that an order issue regulating the handling of milk in the marketing area under consideration. 7 U.S.C. §608c(9). That "determination,"[13] made after a hearing with the benefit of an evidentiary record, is governed by the same considerations that impelled the Secretary, in the first instance, to convene a hearing. *See* 7 U.S.C. §608c(3). Section 8c(3) of the Act, 7 U.S.C. §608c(3), empowers the Secretary to issue a notice of hearing "[w]henever [he] has reason to believe that the issuance of an order will

[13] The argument by petitioners that "there is no suggestion in Subsection 9 that the Secretary's determinations are not to be based on evidence taken at the prior hearing," *Petition* at 8, is specious. Section 8c(9) of the Act, 7 U.S.C. §608c(9), places no limitations as to what the Secretary may consider in making his "determinations" and thus, the Secretary can, and probably does, consider the evidence introduced at the hearing called under 7 U.S.C. §608c(3).

tend to effectuate the declared policy of [the Act]." The Secretary's "reason to believe" determination is, clearly, a discretionary one that does not require an "evidentiary basis," but is committed to the Secretary's sound discretion.

The various errors ascribed to the Fifth Circuit by petitioners indicate the extent to which they misconstrue the language and purpose of 7 U.S.C. §608c(9). The unsupported assertion that §8c(9) requires a second evidentiary hearing and "findings" to be made by the Secretary, *Petition* at 8, ignores the plain language of that section, which nowhere calls for a second hearing or for "findings." *See* 7 U.S.C. §608c(9). All the Secretary is required to do under that section is to make the above referenced "determinations." *Id.* By comparison, the Secretary is required to make "findings" under §8c(4) of the Act, 7 U.S.C. §608c(4).[14] Congress clearly knew how to require "findings" based upon evidence produced at a hearing, and did so in 7 U.S.C. §608c(4). Petitioners' attempt to attribute to Congress such "carelessness" by failing to so state its desire to have a second evidentiary hearing under 7 U.S.C. §608c(9), simply cannot be squared with the plain language of the Act.[15]

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[14] The Secretary clearly understood the distinction between the "findings" and the "determinations" he was required to make herein as evidenced by his *Order Amending and Merging Orders*, May 28, 1975, 40 F.R. 23437, *et seq.*, *Petition* at A224-A226, App. F.

[15] The further argument that the paranthetical "findings" language contained in 7 U.S.C. §608c(4) "refers to the Subsection 9 findings in question," *Petition* at 8, is patently incorrect. Aside from the fact that 7 U.S.C. §608c(9) does not require any "findings" to be made, the "findings" required under 7 U.S.C. §608c(4) must be made *prior to* the issuance of an order—subsection 8c(9) of the Act comes into play only *after* an order has been issued.

2. The Fifth Circuit Correctly Applied The Teachings Of *Overton Park* In Holding That The Secretary's §8c(9) Determinations Were Agency Actions, Unreviewable Except For Procedural Irregularity Or Fraud.

The major "error" attributed to the Fifth Circuit by petitioners is that court's holding that the Secretary's determinations (a) that lack of handler approval tended to prevent effectuation of the declared policy of the Act, and (b) that the issuance of the producer approved order was the only practical means of advancing the interest of producers,[16] were agency actions entrusted to the Secretary's discretion by law, not reviewable by the courts except for fraud or procedural irregularity. 666 F.2d at 167, *Petition* at A20, App. A. To prevent a grant of "administrative absolutism" to the Secretary, *Petition* at 10, petitioners argue that these determinations *should be* subject to review under at least the arbitrary, capricious or abuse of discretion tests. *Id.* at 14-15.

Section 10 of the Administrative Procedure Act, 5 U.S.C. §§701-706, provides that judicial review of agency action is to be available to any person aggrieved "except to the extent that—agency action is committed to agency discretion by law." 5 U.S.C. §701(a)(2). In *Citizens To Preserve Overton Park, Inc. v. Volpe, supra,* at 410, this Court held that the "committed to agency discretion" exception applies

> in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply."

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[16] The Act's primary purpose is to promote the interests of *producers*. 7 U.S.C. §601; H.R. Rep. No. 1241, 74th Cong., 1st Sess. 7 (1935); S. Rep. No. 1011, 74th Cong., 1st Sess. 3 (1935); *Friendship Dairies, Inc. v. Butz,* 432 F. Supp. 508, 515 (E.D.N.Y.), *aff'd,* 573 F.2d 1290 (2d Cir. 1977).

Accord, Ness Investment Corp. v. United States Department of Agriculture, 512 F.2d 706, 716 (9th Cir. 1975). Petitioners assert that the Fifth Circuit, in holding that the determinations made by the Secretary pursuant to 7 U.S.C. §608c(9) were committed to agency discretion by law, "failed to follow the mandates of *Overton Park*." *Petition* at 15.

Apart from the fact that this "error" of the Fifth Circuit is inadequate as a matter of law to entitle petitioners to review by writ of certiorari,[17] it is also plainly inaccurate. The Fifth Circuit very carefully and correctly considered and applied the *Overton Park* decision to the present case and held that "7 U.S.C. §608c(9)(B) imposes no 'limits [on the] agency's discretion to act in the manner which is challenged.'" 666 F.2d at 164, *Petition* at A14, App. A (quoting *City of Santa Clara, Cal. v. Andrus*, 572 F.2d 660, 666 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978)). In the present case, there simply "'is no law to be applied,'" *id.*, and thus, the "committed to agency discretion" exception is fully applicable. *Citizens To Preserve Overton Park, Inc. v. Volpe*, *supra*, at 410.[18]

The decision of the Fifth Circuit evidences the painstaking care taken by it in applying the relevant law (including *Overton Park*) to the facts of the present case prior to concluding that the Secretary's "determinations" made pursuant to §8c

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[17] The Supreme Court does not grant a writ of certiorari to correct mere "errors" of the lower courts. *See* discussion, *supra*, at 12-13.

[18] The two cases cited by petitioner for the proposition that the Fifth Circuit "plainly misapplied the *Overton Park* rationale," *Petition* at 12, are inapposite to the present case since each dealt with the preclusion of judicial review pursuant to 5 U.S.C. §701(a)(1), not with the "committed to agency discretion" exception of 5 U.S.C. §701(a)(2). *See Morris v. Gressette*, 432 U.S. 491 (1977); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

(9) of the Act, 7 U.S.C. §608c(9), were "not subject to [its] review."[19] 666 F.2d at 164, *Petition* at A14, App. A. As the Fifth Circuit stated, "the Secretary is directed to determine, *without the development of an additional evidentiary record*, the necessity of the proposed order," under 7 U.S.C. §608c(9). 666 F.2d at 164, *Petition* at A14, App. A (emphasis in original). Without such additional evidence, the courts "are ill-equipped to examine the Secretary's" section 9 determinations. *Id.* at 165, A15. Furthermore, the Fifth Circuit's view of the discretionary nature of the Secretary's determinations pursuant to 7 U.S.C. §608c(9), finds support in the fact that the Act has been consistently so administered since its enactment. *Id.*; *see, e.g., United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 547 (1939); *H.P. Hood & Sons, Inc. v. United States*, 307 U.S. 588, 592 (1939).

Petitioners "conclude" here, as below, that the Secretary's determinations made pursuant to 7 U.S.C. §608c(9) are "subject to judicial review on either the 'substantial evidence' standard or the 'arbitrary, capricious or abuse of discretion' standard, or on both standards." *Petition* at 14. The "substantial evidence" test is the appropriate standard to apply when reviewing findings of an agency made upon a hearing record, *Camp v. Pitts, supra*, at 141, but not where, as here, a statutory power is granted in such broad terms as to permit action upon an administrator's "determination" that the action will "tend to effectuate" a declared statutory policy. To the extent that the Secretary's §8c(9) "determinations," made

[19] The contention by petitioners that judicial review is "urgently required" to prevent the Secretary, once producer approval is obtained, from effectuating the proposed order "without further reflection or discretionary encumbrances," *Petition* at 11-12, simply ignores the "encumbrances" mandated by 7 U.S.C. §§608c(8) and (9).

without the aid of any additional hearings, are reviewable at all, they may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A); *see Camp v. Pitts, supra.* In view of the record before the Secretary, his "determination" that the issuance of the merger order would tend to effectuate the declared policy of the Act and was the "only practical means . . . of advancing the interests of producers" cannot be rejected as arbitrary or unreasonable, and it is, clearly, a determination that he could lawfully make.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SYDNEY BERDE
(Counsel of Record)
RICHARD M. HAGSTROM
GARY W. SCHOKMILLER
BERDE AND HAGSTROM, P.A.
2602 American National
Bank Building
Saint Paul, Minnesota 55101
(612) 291-8106
Attorneys for Associated Milk Producers, Inc., Amicus Curiae in Opposition